INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement of the case	4
Argument	7
Conclusion	11

CITATIONS

Statute and regulation:

Welfare and Pension Plans Disclosure Act, 72 Stat. 997, as amended, 29 U.S.C. 301, *et seq.*:

Sec. 2(a), 29 U.S.C. 301(a)	8
Sec. 2(b), 29 U.S.C. 301(b)	8
Sec. 5(b), 29 U.S.C. 304(b)	9
Sec. 13, 29 U.S.C. 308d	2
Sec. 13(a), 29 U.S.C. 308d(a)	2, 6, 7, 8, 9, 10
Sec. 13(b), 29 U.S.C. 308d(b)	6, 10
Sec. 13(e), 29 U.S.C. 308d(e)	3, 7
29 C.F.R. (1967 rev.) 464.4(d)	10
29 C.F.R. (1967 rev.) 464.4(e)	7
29 C.F.R. (1967 rev.) 464.7(a)	10

281-088—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 681

FIDUCIARY COUNSEL, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (Pet. App. 1–7) is not yet officially reported, but is unofficially reported at 65 L.R.R.M. 2814 and at 55 Labor Cases (CCH) para. 12,038. The oral opinion of the district court (J.A. 18–21)[1] is unofficially reported at 63 L.R.R.M. 2500 and at 54 Labor Cases (CCH) para. 11,565.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1967. The petition was filed on October 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court below.

QUESTION PRESENTED

Whether the courts below correctly sustained the determination by the Secretary of Labor that petitioner, a corporate investment adviser, is subject to the bonding requirement of Section 13 of the Welfare and Pension Plans Disclosure Act since it directs investments and sales of the assets of certain employee pension plan funds, pursuant to the provisions of the pertinent trust instruments.

STATUTE INVOLVED

Section 13 (29 U.S.C. 308d) of the Welfare and Pension Plans Disclosure Act, 72 Stat. 997, as amended (29 U.S.C. 301 *et seq.*), provides as follows:

> Sec. 308d(a) Every administrator, officer, and employee of any employee welfare benefit plan or of any employee pension benefit plan subject to this chapter who handles funds or other property of such plan shall be bonded as herein provided; except that, where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers and employees of such plan shall be exempt from the bonding requirements of this section. The amount of such bond shall be fixed at the beginning of each calendar, policy, or other fiscal year, as the case may be, which constitutes the reporting year of such plan. Such amount shall not be less than 10 per centum of the amount of funds handled, determined as herein provided, except that any such bond shall be in at least the amount of $1,000 and no such bond shall be required in an amount in excess of

$500,000: *Provided,* That the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, which in no event shall exceed 10 per centum of the funds handled. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of such administrator, officer, or employee, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 6–13 of Title 6. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

* * * * *

Sec. 308d(e) The Secretary shall from time to time issue such regulations as may be necessary to carry out the provisions of this section. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of the financial responsibility of the plan, or

that other bonding arrangements would provide adequate protection of the beneficiaries and participants, he may exempt such plan from the requirements of this section.

STATEMENT OF THE CASE

Petitioner, Fiduciary Counsel, Inc., is a New York corporation registered with the Securities and Exchange Commission as an investment adviser and engaged in the business of providing counseling to clients on a fee basis with respect to the purchase and sale of securities (Pet. App. 1). Since October 1962, petitioner has been acting as investment counselor to two pension trusts set up by the Parker Pen Company for the purpose of providing retirement, death and disability benefits for certain of its employees. The trusts, with a total value of $6,538,000, consist entirely of funds contributed by the Parker Pen Company; and the trustee of each plan is presently a Wisconsin bank (Pet. App. 2; J.A. 14, 19). Although making no contributions, the employees eligible to receive benefits were informed about the existence and nature of these trusts (J.A. 14).

All funds of the trusts are segregated from Parker Pen's general assets and are separately maintained in the custody of the trustee. Both trust instruments provide that the company shall have "no right, title or interest in the contributions made by it under the Plan," that no part of the retirement fund or its income shall revert to the company, and that all benefit payments shall be paid "only" from the retirement fund (Govt. C.A. Br. 1b–3b). While the trustee is given

full power to make sales and investments from time to time, the instruments clearly grant to the employer "a right to retain an investment adviser who can give to the trustee binding directions as to investment" (Pet. App. 2). Pursuant to this provision the company named petitioner, Fiduciary Counsel, Inc., the investment counselor to the trust (J.A. 14, 19). It was "mandatory" that the trustee bank "make every sale and investment which [Fiduciary Counsel, Inc.] direct[ed] it to make, and from time to time since October 2, 1962, [Fiduciary Counsel, Inc.] has directed the trustee Bank, pursuant to this provision, to make sales and investments which the trustee Bank has made" (J.A. 15).

Parker Pen has filed reports covering the two plans with the Secretary of Labor as required by the reporting and disclosure provisions of the Welfare and Pension Plans Disclosure Act. On April 25, 1963, the Secretary advised petitioner, Fiduciary Counsel, Inc., that it was subject to the bonding requirement of the Act (Pet. App. 2). Petitioner, upon being so notified, indicated its disagreement with this determination.

Petitioner then brought this action against the Secretary to obtain a declaratory judgment either that the bonding requirement of the Act did not apply to it, or that, if applicable, the Secretary was arbitrary and capricious in not granting it an exemption (Pet. App. 2). The Secretary counterclaimed for an injunction requiring petitioner to bond its employees against dishonesty losses in the handling of funds of the two

Parker Pen pension plans.[2] On cross-motions for summary judgment, the district court granted judgment for the Secretary, agreeing that the bonding requirement of Section 308d(a) was applicable to Fiduciary Counsel, Inc. (J.A. 17–21).

Noting that the investment counselor in this case "participates in the administration of the fund because it not only advises but actually gives binding directions as to what investments should or should not be made," the district court concluded that "the Secretary of Labor acted reasonably in construing the word 'administrator' as applying to the [petitioner]" (J.A. 20). The district court further found that petitioner was subject to the bonding requirement of the Act as a person who handles the funds of the plan, because "[a] person who has the power to give binding directions as to the investment of the fund participates in handling the funds" (J.A. 20).

The court of appeals affirmed the district court's ruling that petitioner is subject to the bonding provisions of the Welfare and Pension Plans Disclosure Act, expressly noting "the Congressional concerns about the jeopardy in which pension assets had been

[2] Section 13(b) of the Act (29 U.S.C. 308d(b)) makes it "unlawful for any administrator, officer, or employee" to whom the bonding requirement of Section 13(a) applies "to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension benefit plan, without being bonded as required by subsection (a) * * *."

placed by the dissipation which can flow from either direct thievery or dishonest investment * * *'" (Pet. App. 3). However, the court of appeals remanded the case to the district court for a determination as to the reasonableness of the Secretary's regulation which exempts banks,[3] but not registered investment advisers like petitioner, from the bonding requirement[4] (Pet. App. 6–7).

ARGUMENT

The decisions of the courts below—and the administrative determination of the Secretary of Labor—that Section 13(a) of the Welfare and Pension Plans Disclosure Act covers the investment counselor here involved are plainly correct. That statutory provision requires the bonding of "[e]very administrator" of an employee pension plan "who handles funds or other property of such plan * * *" (*supra*, p. 2). Petitioner clearly fits into that category. No conflict with the decision of any other court exists. Indeed, petitioner does not cite a single case in its certiorari petition. Review by this Court is thus not warranted.

As recognized by the court of appeals (Pet. App. 3), Congress enacted the Welfare and Pension Plans

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[3] By regulation (29 C.F.R. (1967 rev.) 464.4(e)) the Secretary has exempted from the bonding requirement banks and trust companies subject to regulation and examination by federal or State authorities (see Pet. App. 4). That regulation is promulgated pursuant to the authorization contained in 29 U.S.C. 308d(e) (*supra*, pp. 3–4).

[4] The Secretary is not seeking certiorari from that part of the decision of the court of appeals directing this remand.

Disclosure Act in light of the "rapid and substantial" growth in recent years of employee welfare and pension plans, which directly affect "the continued well-being and security of millions of employees and their dependents" (29 U.S.C. 301(a)). Against this background, the Act was enacted to protect "the interests of participants in employee welfare and pension benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto" (29 U.S.C. 301(b)). Thus, to protect the employees covered by the plan "against loss by reason of acts of fraud or dishonesty on the part of such administrator, officer, or employee, directly or through connivance with others" (29 U.S.C. 308d(a)), the Act requires that "[e]very administrator, officer, and employee of an employee welfare benefit plan or of any employee pension benefit plan subject to this chapter who handles funds or other property of such plan shall be bonded" upon terms satisfactory to the Secretary of Labor (*ibid.*).

The investment counselor in the instant case is plainly within the statutory provisions requiring the bonding of "[e]very administrator" of an employee pension plan "who handles funds or other property of such plan * * *." As pointed out by the courts below, "The investment counselor in this instance participates in the administration of the fund because it not only advises but actually gives binding directions as

to what investments should or should not be made" (J.A. 20; see also Pet. App. 2).[5]

Moreover, in directing the trust fund investment policy to be followed by the trustee bank, petitioner necessarily "handles funds or other property" of the two pension plans. As pointed out by the court of appeals, "Although the trust instruments seemingly embody an unrestricted power in the trustee to control investment, they also clearly grant to the employer a right to retain an investment adviser who can give to the trustee binding directions as to investment" (Pet. App. 2).[6] Indeed, it was stipulated that "it is mandatory that the trustee Bank make every sale and investment which [petitioner] directs it to

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[5] Petitioner's reliance on the statutory definition of the term "administrator"' in 29 U.S.C. 304(b) is quite misplaced. In substance, that term is defined as referring to those "actually responsible for the control, disposition, or management of the money received or contributed * * *." One empowered to give binding directions as to the investment of trust funds is, without doubt, in fact "responsible for the control, disposition, or management" of those funds. Here that power was actually exercised by petitioner (see *infra*, p. 10). And, as noted by the district court (J.A. 20), Section 304(b) plainly contemplates that "[t]here may be more than one administrator."

[6] That the company reserved the right to terminate its relationship with petitioner, and, indeed, to terminate the employee benefit plan itself, does not argue for a result different than that reached below. Unless and until such termination occurred, petitioner was covered by the provisions of Section 13(a) (29 U.S.C. 308d(a)). If that were not the case, an easy escape from the Act's bonding requirement would be provided—retain an investment adviser but make the arrangement a terminable one. Congress could hardly have intended to sanction such a facile device which would effectively deny the protections of the Act to the intended beneficiaries—the employees covered by the particular plan.

make, and from time to time since October 2, 1962, [petitioner] has directed the trustee Bank, pursuant to this provision, to make sales and investments, which the trustee Bank has made" (J.A. 15).[7] Thus, petitioner not only had the power to control the trust funds, but actually exercised that power.[8] In sum, the Secretary's determination that petitioner is within the reach of the bonding requirement of the Act was both reasonable and correct, and, contrary to petitioner's contentions (Pet. 7), did not extend or broaden that requirement beyond the scope intended by Congress. Petitioner's claim that it is outside the coverage of the Act was thus properly rejected.

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[7] Thus, even if it might be concluded that petitioner is not technically an "administrator" (but see note 5, *supra*), Section 13(b) (29 U.S.C. 308d(b)), in addition to the language set out in note 2, *supra*, further provides that "any other person having authority to direct the performance of such functions" (*i.e.*, receipt, handling, etc., of employee benefit plan funds) shall not permit such functions to be performed unless the bonding requirement of Section 13(a) has been met. This language cannot be regarded as superfluous. Rather, it manifests the congressional intent to ensure that the functions normally performed by administrators will be covered by the bonding requirement, even if assigned or delegated to others. To permit such individuals to go unbonded would obviously frustrate the purposes of the Act (see 29 C.F.R. (1967 rev.) 464.4(d)), which implements this language in Section 13(b)).

[8] In this connection, it is significant that the Secretary's regulations provide that the scope of the term "handles", as used in this context, includes "decision making powers with respect to funds or property which can give rise to * * * risk of loss" to the pension plan beneficiaries (29 C.F.R. (1967 rev.) 464.7(a)).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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